DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR GWENDOLYN C. WALKER
CC:LM:RFP:ATL

FROM: Jasper L. Cummings
Associate Chief Counsel CC:CORP

SUBJECT:

This Field Service Advice responds to your memorandum dated August 11, 2000. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

DISCLOSURE STATEMENT

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TL-N-3614-00

LEGEND

OldCorpA =
NewcoX =
NewcoY =
Sub1 =
Sub2 =
Sub3 =
Sub4 =
Sub5 =
Sub6 =
Sub7 =
Sub8 =
Sub9 =
Sub10 =
Sub11 =
Sub12 =
Sub13 =
Sub14 =

Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =
Year 6 =
Year 7 =

Date =

P =
Q =
R =
S =
T =

Address =

NewName =
New CorpA =

PLR =

ISSUES

(1) Are the Forms 872 executed by P on March 27, Year 5, December 15, Year 5, and February 10, Year 7, with regard to the OldCorpA and Subsidiaries consolidated group's Year 1 return valid?

(2) Should the Service obtain Forms 977 and 2045 from transferees, if any.

CONCLUSIONS

(1) We believe that the Forms 872 executed by P on March 27, Year 5, December 15, Year 5, and February 10, Year 7, are valid.

(2) We believe that the Service should, before Date, obtain Forms 977 and 2045 from Sub9 and from NewName transferees.

FACTS

In Year 1, OldCorpA, a calendar year taxpayer, was the common parent of a large consolidated group consisting (among others) of Sub1; Sub2; Sub3; Sub4; Sub5; Sub6; Sub7; Sub8; Sub 9; Sub10; Sub11; Sub12; and Sub13. As common parent, OldCorpA filed the consolidated return for the group for that year.[1]

On or around July 21, Year 4, Sub8 changed its name to NewName and Sub10, and Sub3, merged with and into NewName.

On October 20, Year 4, several events occurred. First, OldCorpA created two new subsidiaries: NewcoX and NewcoY by transferring to them the stock of its subsidiaries in exchange for their stock. This restructuring effected a separation of its subsidiaries along business lines. OldCorpA transferred to NewcoX, among others, the stock of NewName, Sub12, and Sub14 (which had joined the consolidated group in Year 3). OldCorpA transferred to NewcoY, among others, the stock of Sub9, Sub1, Sub4, Sub6, Sub2, and Sub5. NewcoY then retransferred to Sub9 the stock of (among others) Sub1, Sub4, Sub6, Sub2, and Sub5. NewcoX then retransferred to NewName the stock of (among others) Sub12, and Sub14. OldCorpA then spun off the stock of NewcoY to its shareholders and merged with and into NewcoX

[1]OldCorpA also filed consolidated returns for the group for Year 2 and Year 3. Field counsel raised the same issues with regard to these years as well. We note, however, that Year 2 is not a deficiency year. Year 3 does not present a problem because a statutory notice of deficiency was sent within the 3-year limitations period. Therefore, we are only responding to the issues raised by field counsel as they relate to Year 1.

Sometime after October 20, Year 4, NewcoY, changed its name to NewCorpA, thereby taking the same name as OldCorpA. Several months later, Sub12, a wholly owned subsidiary of NewName, merged with and into NewName.

On March 27, Year 5, December 15, Year 5, and February 10, Year 7, P signed Forms 872 with regard to the OldCorpA and Subsidiaries consolidated group's Year 1 return. When he signed these forms, P was no longer an officer of OldCorpA, which had merged out of existence, but he was an officer of NewCorpA.

Sometime shortly before April 15, Year 7, P, as an officer of NewCorpA, filed a protective claim for refund with regard to OldCorpA's tax Year 2. On April 13, Year 7, the Service issued a statutory notice of deficiency to NewcoX, as successor to OldCorpA and as alternative agent to the former members of the OldCorpA and Subsidiaries consolidated group for the group's Year 1 return. NewcoX, as alternative agent, filed a timely petition in the Tax Court for Year 1.

LAW AND ANALYSIS

Issue 1. The Forms 872 executed by P on March 27, Year 5, December 15, Year 5, and February 10, Year 7 are valid.

P was an officer of OldCorpA, and he is currently an officer of NewCorpA. He could have executed valid Forms 872 in that capacity if OldCorpA had been in existence on those dates. However, OldCorpA merged into NewcoX on October 20, Year 4, and thereafter ceased to exist. P is not an officer of NewcoX, the alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii). Therefore, he does not appear to have authority under the consolidated return regulations to extend the statute of limitations with regard to the surviving members of the OldCorpA and Subsidiaries consolidated group. Furthermore, the Forms 872 signed by P do not bind NewCorpA. NewCorpA was not a member of the OldCorpA and Subsidiaries group in Year 1 and, therefore, it is not severally liable for the group's Year 1 tax. See Treas. Reg. § 1.1502-6.

However, we believe that the Forms 872 are valid based on the following common law agency grounds:

Ratification. Ratification is the *after-the-fact* express or implied adoption or confirmation by one person, with knowledge of all material matters, of an act performed on his behalf by another who lacked all authority to do so. Ratification serves to authorize an action which was preauthorized when taken.

The Appeals Office received a Form 2848, Power of Attorney (POA), one month prior to April 15, Year 7. This POA authorizes P to deal with the Service with regard to the OldCorpA and Subsidiaries consolidated group's tax for Year 1, Year

2 and Year 3. The POA was signed by R, who appears to be an officer of NewcoX, the alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii). As alternative agent, NewcoX has the authority to act on behalf of the former members.

Agent of an agent. There is a deemed actual and apparent authority for P to act on behalf of NewcoX, the alternative agent under Temp. Reg. § 1.1502-77T(a)(4)(ii). An April 21, Year 7, memorandum to T, a Service Appeals officer, from S, a Service Examinations officer, contains the following statement:

> Q stated that there was (or had been) an arrangement between NewcoX in which P would handle any subsequent tax matters that arose. It was my impression that this arrangement (or agreement) was informal and not in writing (I may have asked if there was a writing, but I cannot say for sure).

Q is an officer of NewCorpA, but it is unknown what role he had, if any, in OldCorpA. Nevertheless, it appears that there may have been a tax sharing or a tax representation agreement between NewcoX and NewNameA. In Alumax v. Commissioner, 109 T.C. 133, 196-199 (1997), the Tax Court found that a tax sharing agreement was sufficient to establish agency based on the principle of an "agent of an agent."

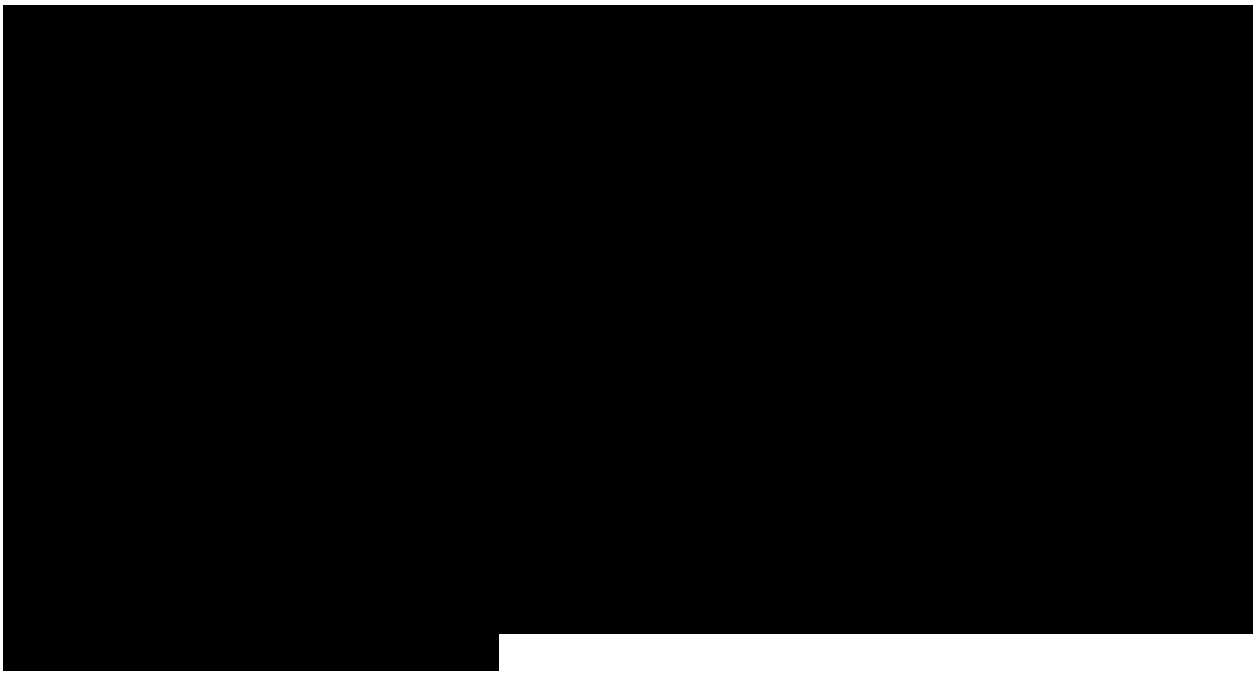
The Form 2848 (Power of Attorney) executed by R, an officer of NewcoX, authorized P to act as agent for NewcoX. We believe that this may be sufficient to establish the principle of "agent of an agent" in this case. NewcoX has indicated, at least verbally (and by way of a belated power of attorney), that P has the authority to act on behalf of NewcoX, the alternative agent.

The "agent of an agent" argument is based solely on general agency law and not on the proper interpretation of any particular provision of the consolidated return regulations. In this regard, we note that the Tax Court has, on more than one occasion, looked outside the consolidated return regulations to general principles of state agency law to determine agency issues relevant to consolidated groups filing consolidated returns. See, for example, Alumax v. Commissioner, 109 T.C. 133, 196-199 (1997); Lone Star Life Insurance Company v. Commissioner, T.C. Memo. 1997-465. We see no difference between the present situation and one in which a standalone taxpayer corporation engages another corporation to act as its agent. We believe that the issue presented here could just as likely have arisen in a situations that did not involve the filing of a consolidated return.

Estoppel. P handled this case throughout the Examination process and the Appeals process. He never informed Appeals or Exam that OldCorpA merged out of existence in October 20, Year 4 and that NewCorpA (for which he currently works) is a totally different company. The Appeals Officer asserts that P deceived

the Service in executing a previous Power of Attorney form, and the subsequent Forms 872, all showing the taxpayer as OldCorpA and Subsidiaries, and listing the EIN number of OldCorpA. See Union Texas International Corporation v. Commissioner, 110 T.C. 321(1998).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



Issue 2: Should We Obtain Forms 977 from Transferees?

The answer, in short, is yes. Assuming that the Forms 872 for Year 1 tax year are not valid, the statute of limitations with regard to that year would have expired on September 15, Year 5. Section 6901(c)(2) gives the Service two extra years (in addition to the normal 3-year statute of limitations) to assess against a transferee of a transferee. With regard to tax owed for Year 1, the 2-year "transferee of a transferee" period expires on Date. To ensure protection of the statute of limitations, the Service must obtain Forms 977 from Sub9 and from NewName or issue notices of transferee liability to those corporations before Date.[2]

[2]Please note that I.R.C. § 6901(c)(2) provides that the Service must assess the liability against the transferee of a transferee within one year from the expiration of the period of limitations against the preceding transferee, but not later than three years from expiration of the period of limitations for assessment against the initial transferor.

Sub9 is a “transferee of a transferee” because it received assets that were originally owned by OldCorpA and that were subsequently transferred by OldCorpA to NewcoY, which in turn transferred the assets once more to Sub9 These assets include (among others): the stock of Sub1, Sub2, Sub4, Sub5, and Sub6. All of these corporations were members of the OldCorpA group in the group’s Year 1 tax year.

NewName is a “transferee of a transferee” because it received the stock of Sub14 (a company that joined the OldCorpA group in Year 3). Sub14 was originally owned by OldCorpA and transferred by OldCorpA to NewcoX, which in turn transferred the Sub14 stock once more to NewName. Also, NewName is a “transferee of a transferee” with regard to the stock of Sub12, which was originally owned by OldCorpA and was transferred by OldCorpA to NewcoX and retransferred to NewName. That status as a “transferee of a transferee” was not affected when Sub12 later merged into NewName, which then became a transferee with respect to the assets of Sub12 [3]

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[redacted]

[3]Note that NewName, would not be a transferee of a transferee if, in Year 1, Sub12, was already its subsidiary. However, according to the facts recited in PLR, NewcoX planned to contribute the stock of Sub12 to NewName as part of the Year 4 restructuring. This indicates that Sub12 was not a subsidiary of NewName (formerly Sub8) in Year 1.

[redacted]

Please call if you have any further questions.

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Special Counsel
CC:CORP:B06

cc: